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EXPLICATION DU TEXTE: "I'M AN ORIGINALIST; I'M A TEXTUALIST; I'M NOT A NUT"

D. A. Jeremy Telman*

Justice Antonin Scalia frequently reminded people of his position as a self-described "faint-hearted" originalist:¹ "I'm an originalist; I'm a textualist; I'm not a nut," he often remarked.² The statement epitomizes Justice Scalia's uniqueness among our Supreme Court Justices. He was as much a showman as a jurist. He knew how to speak to the bench and the bar and to the far broader audiences that he alone among his colleagues was particularly skilled at reaching. The statement was classic Justice Scalia because in ten words he managed to appeal simultaneously to three very distinct audiences.

I.

"I'm an originalist" in itself is a show-stopper for some audiences before which Justice Scalia regularly appeared. The profession of belief could stand alone and elicit a standing ovation from the Federalist Society or from a meeting of the Tea Party, coming as it did from a sitting Supreme Court Justice. In those contexts, Justice Scalia's embrace of originalism was a valuable shorthand expression that stood for a relatively simple but powerful political and jurisprudential agenda. People on both sides of the originalism/living constitutionalism divide agree that originalism arose in response to the perceived activism of the Warren and Burger Courts. To proclaim one's originalism is to distance oneself from that tradition of liberal jurisprudence. In that context, originalism is about judicial modesty, about fidelity to a literal reading of the constitutional text, and in particular it is about hostility to expansions of unenumerated individual rights, such as the right to privacy.

Justice Scalia stressed his originalism because he knew how important it was to certain constituencies to hear someone in a position of power embrace their political agenda. Justice Scalia could forthrightly proclaim

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¹ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

² Jeffrey Rosen, *What Made Scalia Great?*, THE ATLANTIC (Feb. 15, 2016), <http://www.theatlantic.com/politics/archive/2016/02/what-made-antonin-scalia-great/462837/> [<https://perma.cc/5NGB-GRFY>]; Nina Totenberg, *Justice Scalia, the Great Dissenter, Opens Up*, NPR (May 8, 2008), <http://www.npr.org/templates/story/story.php?storyId=89986017> [<https://perma.cc/2NXQ-IB2W>].

his originalism. He need not stress the faint-heartedness of that originalism, as doing so would only call into question the authenticity of his originalism before the very constituencies who so valued his adherence to the originalist faith.

II.

When Justice Scalia added, "I'm a textualist," he was addressing and appealing to a different audience, although of course there is always some overlap. The embrace of originalism sends a clear message; the embrace of textualism is far more technical, and it is hard to imagine that textualism could become the political rallying cry that originalism has been for some time. Justice Scalia's invocation of textualism is directed at the legal academy and the small clerisy of constitutional litigators and adjudicators who practice or espouse this very particular approach to legal interpretation.

Justice Scalia's textualism stands for two distinct ideas. First, textualism is Justice Scalia's great contribution to the theory of originalism in constitutional interpretation, but many adherents of popular constitutionalism do not know it, and they might not agree with Justice Scalia if they did. Early originalists argued that judges, in interpreting the Constitution, needed to be faithful to the original *intentions* of the Framers. The Constitution ought to mean what, for example, James Madison thought it meant. By the mid-1980s, legal scholars had largely discredited originalist intentionalism. They did so by pointing out just how difficult it is to know the intentions of the dozens of men involved in drafting the Constitution and, what matters more, the 1800 men at state ratification conventions who actually voted to make it law. In addition, legal scholars showed that the Framers themselves did not intend for future generations to be bound by their subjective understandings of the text they had helped to create.

But Justice Scalia pointed out that originalists need not be faithful to original intentions; it suffices that they be faithful to the constitutional text, as its intended late eighteenth-century audience would have understood it. That textual meaning is what binds us and what constrains judges and other lawmakers.

The other idea summed up in the word "textualism" is Justice Scalia's fabled hostility to resort to legislative history in the interpretation of legal texts. Memorials to Justice Scalia proclaim that this textualism is Justice Scalia's great legacy to our legal culture. I have not seen any empirical studies to this effect, and I do not know if such a study is possible, but some legal scholars credit Justice Scalia with a significant reduction in judges' resort to legislative history. I suspect that here as elsewhere,

Justice Scalia's main impact has been rhetorical. Where texts are clear and unambiguous, textualism suffices to resolve legal controversies. But in most cases, legal texts are subject to various interpretations, and so a resort to extrinsic evidence is called for. Even the great textualist, Justice Antonin Scalia would not ignore legislative history in the service of textual interpretation.

III.

Justice Scalia addressed a popular audience when he said "I'm an originalist," and he addressed a scholarly audience when he said "I'm a textualist." When he said "I'm not a nut," he was addressing his critics and his colleagues on the U.S. Supreme Court. Justice Scalia was not a nut because he remained true to the originalist credo of judicial modesty. Judges are constrained, not only by the constitutional text but also by precedent. There may arise times when a strict originalism would lead to an outcome at odds with settled legal expectations. On such occasions, principle must bow to reality. So, for example, Justice Scalia is comfortable with the precedent established by the Court's ruling in *Brown v. Board of Education*, despite the fact that the Fourteenth Amendment, as originally understood, permitted segregated schools. Similarly, he seems to have acquiesced in the application of the Equal Protection doctrine to "discrete and insular minorities," in myriad ways that those groups were not accorded equal protection of law at the time of the Fourteenth Amendment's adoption.

One would expect that Justice Scalia's faint-hearted originalism would remain sufficiently robust as to resist the expansion of suspect legal doctrines. That has not always proved to be the case. Although substantive due process is the doctrine at the heart of the liberal judicial activism that originalism so abhors, Justice Scalia was willing to embrace the doctrine in his separate concurring opinion in *McDonald*.³ Justice Thomas, a less "faint-hearted" originalist than Justice Scalia, wrote separately in *McDonald*, voicing his unwillingness to accept the grounding of a substantive right in a constitutional provision that speaks only to process.⁴

There are many other occasions on which the two originalist Justices have parted ways, and that is why Justice Scalia's credo: originalist, textualist, ~~nut~~ is so powerful. He draws us in with his appeal to

³ See *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 791 (2010) (Scalia, J., concurring) ("Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights 'because it is both long established and narrowly limited.'") (internal citation omitted).

⁴ *Id.* at 806-07 (Thomas, J., concurring).

originalism; he embraces us with his textualism, and then he repels, with the pithy rhetorical force that few could rival, by decrying as a “nut” anyone so benighted as to stand on the principles of originalism and textualism alone.

When a great jurist dies, it is tempting to reduce his legacy to one thing or to some coherent constellation or related ideas. And so the fight over the true Justice Scalia begins. Despite his appeal to originalist principle, it is very difficult to find cases in which Justice Scalia’s originalism trumped his political instincts. Justice Scalia himself liked to point to the flag-burning case⁵ as the counter-example, and others never tire of suggesting that we ought to be surprised that the “conservative” Justice Scalia sided with criminal defendants in many cases. Justice Scalia’s political instincts do not all resolve into conservatism, but certainly a libertarian sensibility informed his sympathetic response to criminal defendants and, yes, even to flag-burning hippies, whose rights the government was seeking to further curtail.

⁵ Texas v. Johnson, 491 U.S. 397 (1989).